Supreme Court, U.S.
FILED
JAN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-962

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHERN UNION COMPANY,
Petitioner,

v.

CONSOLIDATED OIL & GAS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

---

BRIEF OF RESPONDENT IN OPPOSITION

PAUL M. SMITH *
DAVID A. BONO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 755-0184

MICHAEL B. CAMPBELL
BRADFORD C. BERGE
CAMPBELL & BLACK, P.A.
P.O. Box 2208
Santa Fe, NM 87504
(505) 988-4421

Counsel for Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

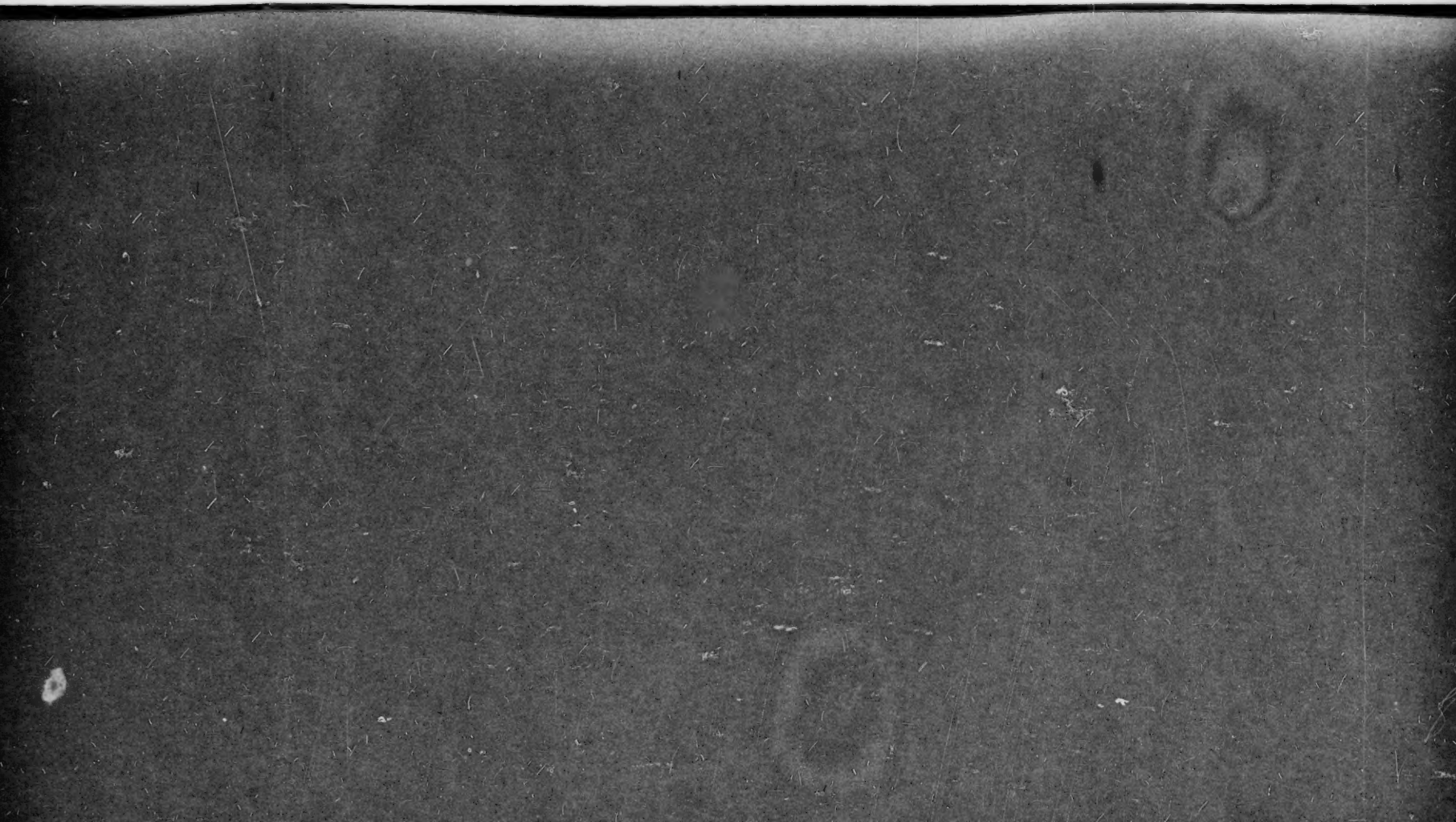

TABLE OF CONTENTS

	Page
STATEMENT	2
ARGUMENT	8
I. The Ruling Below Was Clearly Correct	9
1. This Case and Arkla	11
2. General Preemption Analysis	14
3. Federal Duties and the State Tort Theory	18
II. There is No Reason to Review a Fact-Specific Ruling in an Area Where FERC Itself Is Just Beginning to Elaborate Rules on a Case-by-Case Basis	20
CONCLUSION	21

TABLE OF AUTHORITIES

Cases: Page

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 17
Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7 (1983) 15
Amalgamated Ass'n of Street, Electrical Railway & Coach Employees v. Lockridge, 403 U.S. 274 (1971) 17
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) ..... *passim*
California v. Southland Royalty Co., 436 U.S. 519 (1978) 3
Chicago & N.W. Transp. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 15, 18
City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 15
Columbia Gas Transmission v. Allied Chemical Corp., 652 F.2d 503 (5th Cir. 1981) 3
Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275 (D.C. Cir. 1986) 5
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 15, 17
Farmer v. United Bhd. of Carpenters & Joiners, 430 U.S. 290 (1977) 18
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 15
Gulftide Gas Corp., 31 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61, 228 (June 6, 1985) 6, 20
Hines v. Davidowitz, 312 U.S. 52 (1941) 15
International Longshoreman's Ass'n v. *Davis*, 476 U.S. 380 (1986) 18
In the Matter of Southern Union Gas Company's Application Seeking Increases in its Costs of Gas Charged to the Adjustment Account [*etc.*], Case No. 1179 (N.M.P.S.C. June 22, 1976) 6
Jones v. Rath Packing Co., 430 U.S. 519 (1977) 15
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) 18
Nantahala Power & Light Co. v. Thornburg, 106 S. Ct. 2349 (1986) 11

TABLE OF AUTHORITIES—Continued

	Page
Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984)	17
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983)	15, 18
Perez v. Campbell, 402 U.S. 637 (1971)	15
Public Service Comm'n v. Mid-Louisiana Gas Co., 463 U.S. 319 (1983)	13, 14
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	15
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	18
United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954)	18
Statutes:	
15 U.S.C. § 3431(b)(1)(A) (1982)	13
18 C.F.R. § 157.40 (1978)	14
Natural Gas Act	*passim*
Natural Gas Policy Act	*passim*
Other Authorities:	
H.R. Rep. No. 709, 75th Cong., 1st Sess. (1937)	17
S. Rep. No. 1162, 75th Cong., 1st Sess. (1937)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-962

SOUTHERN UNION COMPANY,
Petitioner,

v.

CONSOLIDATED OIL & GAS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

---

BRIEF OF RESPONDENT IN OPPOSITION

Respondent Consolidated Oil & Gas, Inc. ("Consolidated") submits this brief in opposition to the petition for a writ of certiorari filed by the Southern Union Company ("Southern Union"), which seeks review of a state-law damage award based on negligent misrepresentations of fact made in connection with the settlement of a previous state lawsuit.[1] The basic issue presented is whether this tort judgment is preempted by federal regulation of gas prices under the Natural Gas Act (NGA) and the Natural Gas Policy Act (NGPA).

---

[1] Consolidated Oil & Gas, Inc. has partial interests in Columbus Energy Corp. and Consolidated Energy Partners. Columbus Energy Corp., in turn, wholly owns CEC Resources, Ltd. and Columbus Gas Services, Inc. Consolidated Energy Partners owns a partial interest in Consolidated Operating Partners.

The Supreme Court of New Mexico, in affirming the judgment, ruled that an award of damages for the tortious misconduct at issue here does not conflict with federal law or policies. In collateral proceedings, the Federal Energy Regulatory Commission (FERC) has also found, on three separate occasions, that the trial court's award was not preempted. In light of the unanimous agreement of the New Mexico courts and FERC on this issue, as well as the fact-specific nature of this case, Supreme Court review clearly is not warranted.

STATEMENT

In the 1950s and 1960s, respondent Consolidated, a small gas producer in the San Juan Basin of New Mexico, signed various long-term sales contracts with petitioner Southern Union. All of these contracts contained "most favored nations" clauses entitling Consolidated to be paid the highest price paid to any producer in the Basin. Respondent's Appendix (Resp. App.) 4a.[2] In 1959 and 1963, Southern Union's attorneys obtained for Consolidated "Certificates of Public Necessity and Convenience" from the Federal Power Commission covering four of the contracts. Resp. App. 2a-3a.

During the relevant time period, Southern Union operated two parallel underground pipelines from the San Juan Basin. One transported gas solely for resale within the state, while the other transported gas in interstate commerce, for sale both within and outside the state. Southern Union possessed the ability to switch, easily and unilaterally, the gas from a particular producer's well into one pipeline or the other without the producer's knowledge.[3] The choice between pipelines was of little

---

[2] Although required to do so by Rule 21(k)(ii) of the Rules of this Court, petitioner has not included in its appendix the findings of fact and conclusions of law entered by the state district court after trial. This ruling appears as Appendix A to this brief.

[3] Resp. App. 3a. The certificates allowed, but did not require, the shipment of the gas produced in interstate commerce subject

consequence to suppliers in the 1960s, when interstate and intrastate gas prices did not differ. It became important by the mid-1970s, however, when intrastate prices rose above federally imposed interstate price ceilings.

By 1974, Consolidated believed that Southern Union was in breach of the pricing provisions in the contracts. In September of that year, it filed suit in New Mexico District Court to enforce six specified contracts. The complaint did not mention various other Southern Union contracts based on a concern they might involve gas flowing in interstate commerce, and thus might be subject to federal price controls.

Southern Union won a motion for summary judgment in the case but, during the pendency of the appeal, initiated negotiations with Consolidated that culminated in a settlement on June 28, 1976.[4] Under the settlement agreement that was ultimately executed by the parties, Consolidated released its claims under existing contracts in return for two types of relief. It was to receive a lump-sum payment, plus revised contractual arrangements providing for specified higher prices in the future. Resp. App. 6a.

The final settlement was not limited to the six contracts named in the complaint. Its broader scope resulted from the fact that, during the settlement negotiations, Consolidated specifically questioned Southern Union concerning the resale destination of the gas sold under all of its various contracts with that company. This information, which was solely in the hands of Southern Union, Resp. App. 3a, was significant because

---

to federal controls. *California v. Southland Royalty Co.*, 436 U.S. 519, 525 (1978); *Columbia Gas Transmission v. Allied Chemical Corp.*, 652 F.2d 503, 510 (5th Cir. 1981).

[4] As the trial court found, the lawyers involved believed that there was a high likelihood that the summary judgment would be reversed on appeal. Resp. App. 4a.

it would determine whether the contracts were subject to federal price ceilings. *See* note 3 *supra*.

Southern Union generally evaded Consolidated's inquiries on this subject. Resp. App. 4a-5a. The first draft of the settlement, submitted by Southern Union's attorneys, applied by its terms only to the six contracts named in the complaint. Pet. App. 6a. Consolidated rejected this proposal because it had not yet received a satisfactory answer to its inquiries concerning the resale destination of gas sold under all of the contracts with Southern Union. Southern Union then submitted a second draft, which applied to ten contracts, including the four previously "certificated" by the FPC. *See* note 3 *supra*. The draft stated that the gas from all ten contracts was "resold and consumed solely within the State of New Mexico and therefore . . . not subject to regulation by the Federal Power Commission." Pet. App. 6a.[5] It provided for the same higher future prices under all ten contracts, and included a corresponding increase in the lump-sum payment. Consolidated executed this second draft and, relying upon it, abandoned its appeal, dismissed its case and released its claims against Southern Union.[6]

Just months after the agreement was signed, Southern Union refused to pay the specified prices for gas being delivered under the four contracts for which federal Certificates of Public Necessity and Convenience had previously been issued (the "disputed contracts"). *See* note 3 *supra*. Claiming that it had actually channeled

---

[5] As noted above, *see* note 3 *supra*, the resale destination of the gas—*i.e.*, whether it had been transported partially or totally in interstate commerce—was the key to determining whether federal price ceilings applied to the contracts.

[6] The settlement was signed on behalf of Southern Union by its vice-president, Oran L. Haseltine, who was also vice-president of the Gas Company of New Mexico—New Mexico's intrastate gas retailer and the recipient of gas from Southern Union's intrastate line. Pet. App. 6a.

gas under these contracts to its interstate line, Southern Union tendered only the price authorized by federal law for interstate gas. Consolidated responded by filing suit against Southern Union in November 1979 in New Mexico district court, claiming a breach of the settlement agreement. The complaint was later amended to allege fraud and then negligent misrepresentation.[7] Southern Union reacted to the complaint by filing a petition with FERC asking the Commission to exercise primary jurisdiction and to bar the relief sought on grounds of federal preemption. It asked the trial court to stay proceedings pending FERC action on the petition.

The court denied the stay motion but referred to FERC two questions: (1) whether the gas under the disputed contracts was within FERC's jurisdiction and thus subject to federal regulation of prices, and (2) if the gas was jurisdictional, what federal price ceilings applied.[8] On August 20, 1984, FERC responded to the court's questions by finding that the gas was subject to federal regulation, Pet. App. 20a-21a, and setting out the applicable federal ceilings, Pet. App. 21a-24a. In response to Southern Union's petition, it refused to exercise primary jurisdiction over the case or to determine in advance whether any damage award might be preempted. Pet. App. 24a-27a. *See also* Pet. App. D (order denying rehearing).[9]

---

[7] The fraud allegation was added in August 1980, eleven months before this Court decided *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). The negligent misrepresentation claim was added in August 1984.

[8] The court stayed discovery on these issues for 60 days to allow FERC to assert primary jurisdiction as to these issues. FERC did not act on the referral for four years. *See* Pet. App. C.

[9] FERC's ruling on the jurisdictional nature of the gas was affirmed in *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275 (D.C. Cir. 1986).

On July 12, 1985, the trial court ruled, after a trial, that Southern Union had negligently misrepresented the resale destination of the gas subject to the disputed contracts, thereby breaching a duty it owed Consolidated under New Mexico law. Resp. App. 7a. Finding that Consolidated had reasonably relied on this factual misrepresentation to its detriment by releasing its state-law claims against Southern Union,[10] the court awarded tort damages. Southern Union appealed the decision to the Supreme Court of New Mexico, arguing that the tort judgment was preempted by federal law, and simultaneously filed a petition with FERC raising the same issue.

FERC rejected Southern Union's preemption argument on June 19, 1986. Pet. App. E. It concluded that the trial court's award did not represent payments in excess of applicable federal ceiling prices. The Commission found that the trial court did not attempt to determine the nature and proper price of the gas at issue; rather, the court examined the duty that Southern Union owed Consolidated to provide accurate information concerning the resale destination of its gas. FERC held that the award of tort damages for negligent misrepresentation, like that for the actual and exemplary damages for fraudulent misrepresentation at issue in *Gulftide Gas Corp.*, 31 Fed. Energy Reg. Comm'n Rep.

---

[10] Consolidated had settled its claims under the indisputably "intrastate" contracts for a lump sum plus revised pricing terms for the future. If the settlement had not included an additional lump sum and additional pricing changes linked to the four disputed contracts, Consolidated could have demanded a different arrangement with respect to the intrastate contracts. The Final Order of the New Mexico Public Service Commission approving this and several related settlements noted that they provided for payments totalling less than half of the outstanding potential liability. *In the Matter of Southern Union Gas Company's Application Seeking Increases in its Cost of Gas Charged to the Adjustment Account* [*etc.*], Case No. 1179 (N.M.P.S.C. June 22, 1976), ¶¶ 7, 13 (Resp. App. B).

(CCH) ¶ 61,228 (June 6, 1985), did not interfere with federal regulation of gas pricing, for neither award represented part of the price paid for natural gas. Pet. App. 52a-54a. Additionally, the Commission found that this Court's decision in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (*"Arkla"*), was inapposite. *Arkla* held that the "filed rated doctrine" precluded an award of damages that had the effect of allowing for payment of a higher price than had been filed with FERC for its approval. Here, by contrast, "[t]he Commission [was] not addressing the filed rate doctrine." Pet. App. 54a. The issue was "whether damages awarded in an action based in tort violate the maximum lawful price provision of the NGPA." *Ibid.* FERC held that these tort damages did not increase the price of gas in contravention of the statutory scheme. Southern Union moved for rehearing of this decision. FERC, however, having "reviewed Consolidated's state court damage award, including the amount of damages, the basis for the damages, as well as the relevant facts and circumstances and applicable legal principles," denied rehearing on May 22, 1987. Pet. App. 58a.

The Supreme Court of New Mexico affirmed the damage award on July 9, 1987. Pet. App. A. It too rejected Southern Union's assertion that the award of damages for negligent misrepresentation interfered with federal regulation of natural gas pricing. Its opinion reviewed the relevant facts and law, as well as the concurrent FERC proceedings, before concluding that the tort damages did not conflict with federally regulated prices—an argument that it found to have been "effectively answered in the appropriate federal forum." Pet. App. 12a. The court also found that *Arkla* did not dictate a contrary result. That case was found not to control for two reasons. First, because there was no requirement of "filed rates" in this case,[11] the particular doctrine at

---

[11] *See* note 21, *infra*.

issue in *Arkla* was inapplicable. More importantly, the award in the present case did not constitute a component of the contract price of gas, as in *Arkla*, but was compensation for tortious conduct in the context of settlement negotiations.

In November of 1987, FERC, on its own motion, reconsidered its prior order and reaffirmed it in another extensive opinion. Pet. App. G. In deciding that there was no need to interfere with the state judgment, the Commission now chose to rely less on the holding of *Gulftide*, *supra*, which it read as applying to only *exemplary* tort damages, and more on its analysis of the particular facts of this case. It was careful to note that some tort actions might be covert efforts to collect excessive rates for gas. But it concluded that, "[i]n this case, it is not the conduct under the contracts that is at issue, but the conduct surrounding settlement negotiations that prompted Consolidated to dismiss litigation against Southern Union." Pet. App. 66a. Because negligent misrepresentation during the course of the earlier settlement is an issue remote from the gas contracts themselves, FERC reaffirmed its view that this tort action was not " 'inextricably intertwined' " with the pricing of gas and thus did not interfere with federal regulations. Pet. App. 67a.

Southern Union's appeal from this FERC ruling is now pending in the United States Court of Appeals for the D.C. Circuit.

ARGUMENT

This case does not warrant further review for two reasons. First, as the various FERC opinions make clear, the New Mexico Supreme Cour was correct in ruling that the compensation paid respondent for a state-law tort would not, in this case, interfere with federal regulation of natural gas pricing. Second, even if there were some doubt about the merits of this ruling, the case is highly fact-specific and has been treated as such by FERC and the courts below. There is no reason for this

Court to get involved at this stage and thereby potentially disrupt FERC's efforts to work out the appropriate accommodation of state and federal interests in this area on a case-by-case basis.

I. The Ruling Below was Clearly Correct.

Despite persistent efforts, Southern Union has so far failed to convince a single judge or FERC Commissioner that the award of tort damages for negligent misrepresentation in this case interferes with federal regulation of gas pricing.[12] The reason for this unanimity is the fact that the damages awarded here are not payments for federally regulated gas but compensation for respondent's justifiable and detrimental reliance on Southern Union's misstatements of fact in the course of the settlement of a state lawsuit that was totally unrelated to federal concerns. As the New Mexico Supreme Court put it succinctly, "[i]n the present case, the trial court awarded damages, *not as contract prices, but as consequences for tortious conduct.*" Pet. App. 12a (emphasis added).

The final FERC opinion, issued just last November, made the same point in greater detail. FERC noted that the "central question" was "whether the damages awarded by the New Mexico court for negligent misrepresentation do or do not represent payments for gas sold." Pet. App. 64a. Since the damages here represent, not payments for gas, but compensation for the "valuable consideration" respondent gave up in settling the earlier case on the basis of petitioner's misrepresentations, FERC approved the damage award. *Ibid.* In so doing, it agreed with Southern Union that the distinction between "tort" and "contract" damages may not always provide an answer to the preemption issue, but analyzed the particular function of the damage award at issue

[12] Nor has petitioner pointed to any other case that conflicts with the ruling below.

and found no conflict with paramount federal policies. Pet. App. 65a-67a.

Petitioner contends here, as it has throughout this litigation, that Consolidated is simply using a tort theory to enforce its contractual right to payment of higher prices under the four disputed contracts than are permitted under federal law. This argument, however, ignores the key facts that led FERC and the court below to approve respondent's tort theory. Southern Union's misrepresentation concerning the jurisdictional status of the four disputed contracts was what led Consolidated to settle its claims under other concededly intrastate contracts for a specified lump sum and specified future prices.[13] Absent this misrepresentation, Consolidated could have demanded comparable consideration in the form of either a higher lump-sum payment or higher future payments under the six intrastate contracts, or it could have litigated its claim under those contracts to a final judgment. In sum, what respondent lost by virtue of the misrepresentation was part of the consideration it had bargained to receive in settling a purely state-law claim.

FERC and the courts below thus were clearly correct in concluding that, while other cases may raise different concerns, the facts here warrant relief: a party should not be able to obtain settlement of an independent state-law claim by misrepresenting the jurisdictional nature of certain gas contracts and then escape the consequences of its tortious conduct by pleading preemption.[14] FERC's

---

[13] Respondent had rejected an earlier settlement draft proposing a compromise that applied only to the six contracts named in the complaint.

[14] This case would be far different, of course, if the only contracts between petitioner and respondent were federally regulated, and respondent was simply using a tort theory to evade federal price ceilings. Petitioner's attempt to characterize this as such a case is simply unavailing.

complete agreement with the state court in this case contrasts sharply with other preemption cases in which this Court has granted review.[15] This fact, combined with the persuasiveness of the analyses undertaken by the Commission and the courts, make it clear that Supreme Court involvement in the case is unnecessary.

Petitioner, of course, mounts a number of attacks on the reasoning of FERC and the New Mexico courts. None, however, is convincing.

1. *This Case and Arkla.* First, petitioner argues that the ruling below is inconsistent with this Court's decision in *Arkla, supra.* In so arguing, however, Southern Union reads that case far too broadly. The sole issue before this Court in *Arkla* was whether the filed rate doctrine "forbids a state court to calculate damages in a breach-of-contract action based on an assumption that had a higher rate been filed, the Commission would have approved it." 453 U.S. at 573. The Court vacated the damage award because, "under the filed rate doctrine, the Commission alone is empowered to make [the] judgment [of rate reasonableness], and until it has done so, no rate other than the one on file may be charged." *Id.* at 581. *See also Nantahala Power & Light Co. v. Thornburg,* 106 S. Ct. at 2349, 2355 (1986) (explaining *Arkla*). *Arkla* thus stands for the proposition that a state court may not mandate payment of a purchase price for gas that has not been approved by FERC and thus violates federal law.

The courts below were correct in finding that *Arkla* did not apply here because no FERC decision was being assumed, bypassed, or contradicted and because no provision of federal law was otherwise being violated. The underlying rationale for this conclusion—one that FERC

---

[15] *See, e.g., Nantahala Power & Light Co. v. Thornburg,* 106 S. Ct. 2349 (1986); *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 580 (1981).

itself expressly approved—was the fact that the damages here were not payments for gas but compensation for independent misconduct. They thus did not serve to bypass federal price ceilings or FERC jurisdiction.[16] To be sure, the *magnitude* of the injury was necessarily calculated as the amount of bargained-for consideration that respondents, having been misled into believing that the four disputed contracts involved non-jurisdictional gas, could not collect, after having compromised its state-law claims under the intrastate contracts. But the injury itself was separate from the contracts and did not relate to any lost payments for *interstate* gas. It thus could be compensated without implicating federal concerns.[17]

As FERC itself recognized, this distinction is reinforced by the fact that, while purchase prices are passed on to consumers, these "tort damages do not represent costs paid for gas, and therefore cannot be recovered in

---

[16] In *Arkla*, FERC had found that the contract damages that had been awarded would represent an increase in the price of gas. *See* 453 U.S. at 549 n.10. In this case, by contrast, FERC found that "the events in question . . . do not involve a situation where Southern Union agreed to buy and Consolidated agreed to sell certain amounts of gas at certain prices. . . . Here, instead, the damages represent what was suffered by Consolidated as a result of a misrepresentation in the context of a settlement of a claim under state jurisdiction which is clearly a matter of state concern." Pet. App. 64a.

[17] Much of petitioner's argument is based on the fact that the damage award was equal to the amount that Consolidated could have collected under the disputed contracts if they were treated the same as the other six "intrastate" contracts and thus not federally regulated. But this fact does not indicate that the damages were covert payments for gas. As FERC stated, because the "price differential between interstate and intrastate rates" reflects the value of the consideration that Consolidated thought it was receiving based on petitioner's misrepresentations, the "fact that the court used [it] to determine the damages does not negate the court's finding of tortious misconduct from which these damages arise." Pet. App. 54a.

current rates." Pet. App. 65a. The "damages will be paid by Southern Union's shareholders. Accordingly . . . the state court judgment does not violate the NGA or the NGPA." *Id.*[18]

In this regard, it is noteworthy that in *Arkla* this Court countenanced the possibility that fraudulent conduct by a purchaser might be sufficient to justify a producer's failure to comply with applicable requirements of prior FERC approval of higher rates and thereby allow it to obtain a higher *purchase price* for interstate gas. 453 U.S. at 583 & n.13. That kind of tort theory, of course, carries with it a significantly greater risk of interference with paramount federal pricing policies than in the present case. Here, by contrast, there has been no attempt whatever to bypass federal price controls under the guise of a tort theory. The damages are simply compensation for independent misconduct.[19]

In the course of its discussion of *Arkla*, petitioner attempts to fabricate an important legal issue by focusing on a single comment of the New Mexico Supreme Court, which distinguished *Arkla* in part on the basis that it involved the filed rate doctrine, whereas here there was

---

[18] This fact is sufficient to alleviate any concern that producers and purchasers will conspire to use a tort theory to bypass federal price ceilings. A purchaser will not be tempted to enter such an arrangement if it knows that the added costs it is incurring cannot be passed on to consumers.

[19] For this reason, this would not, as petitioner suggests, Pet. 21-22, be an appropriate case in which to examine the "tort" questions left open in *Arkla*. In any event, we note that Congress in the NGPA has specified price ceilings and exempted all gas from the NGA requirement that rates be filed with and approved as reasonable by FERC. 15 U.S.C. § 3431(b)(1)(A) (1982); *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 332, 334-36 & nn.12, 14 (1983). Therefore, the issues raised in *Arkla* may never recur.

no such filing requirement.[20] This comment, however, hardly suggests that anything was improper in the court's overall analysis. To begin with, the court's comment that this is not a "filed rate" case was both accurate [21] and premised on earlier comments by FERC.[22] Even more significant is the fact that the court, far from rejecting as irrelevant the underlying principles set forth in filed rate cases like *Arkla* as petitioner suggests, went on to base its holding primarily on the key distinction between this case and *Arkla*. It relied on the fact that here, unlike in *Arkla*, "the trial court awarded damages, not as contract prices, but as consequences for tortious conduct." Pet. App. 12a. That basic fact, of course, is the main justification for the damage award at issue here—a justification that FERC itself has repeatedly endorsed.

2. *General Preemption Analysis.* Having failed to establish any inconsistency with *Arkla*, Southern Union goes on to argue that the decision below conflicts with general principles of preemption analysis established by this Court. In particular, it suggests that the ruling below was based on a wooden distinction between "contracts" and "torts" rather than a functional analysis of the impact of respondent's cause of action on the federal regulatory scheme. Pet. 15-18. Nothing could be further from the truth.

---

[20] Pet. 13-15. *See* Pet. App. 12a ("The Commission distinguished *Arkla* because it was decided on the basis of the filed rate doctrine, which is inapplicable to the present proceeding. We agree.")

[21] The prices charged under the four contracts prior to 1978 did not have to be filed as rates with FERC under the NGA because Consolidated had a blanket small producer certificate. *See* 18 C.F.R. § 157.40 (1978). After 1978, section 601(b)(1)(A) of the NGPA exempted the gas from the filing requirements of the NGA. *Mid-Louisiana Gas, supra.*

[22] *See* Pet. App. 54a ("The Supreme Court's decision [in *Arkla*] . . . was based on the filed rate doctrine. The Commission is not addressing the filed rate doctrine in this case.")

The structure of preemption analysis is well settled. *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 180-82 (1983); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-04 (1983); *Chicago & N.W. Transp. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317-18 (1981). "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). This assumption must of course yield when Congress has expressly preempted state law[23] or has so pervasively regulated an entire sphere as to leave no room for enforcement of state laws on the same subject.[24] It must also yield when there is a specific conflict with federal law, such as where (1) "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or (2) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This Court has stated that the preemption inquiry " 'is essentially a two step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.' " *Kalo Brick, supra*, 450 U.S. at 317-18 (quoting *Perez v. Campbell*, 402 U.S. 637, 644 (1971)).

The courts and the Commission in this case followed the two-step preemption inquiry enunciated by this Court.

---

[23] *See, e.g., Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983); *see generally Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203 (1983); *Rath Packing Co., supra*, 430 U.S. at 525.

[24] *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).

The Supreme Court of New Mexico first ascertained the nature of the tort—*i.e.*, negligent misrepresentation in the settlement of a state lawsuit—and the nature of the relevant federal law—*i.e.*, regulating interstate gas prices. The court recognized that federal regulation is undermined by state enforcement of contracts contrary to the federal scheme, but it found that state and federal law did not conflict in this case because "the trial court awarded damages, not as contract prices, but as consequences for tortious conduct." Pet. App. 12a.

FERC made the basic inquiry three times and consistently came out the same way. First, in its June 1986 order declaring that the award did not represent rates in excess of applicable NGPA ceiling prices, the Commission noted that the award was for negligent misrepresentation and that the federal law set maximum prices for natural gas. It found that the two did not conflict because, as compensation for tortious conduct in the settlement of a state lawsuit, "[t]he award of damages in this case does not amount to an impermissible regulation of the first sale of natural gas in violation of the NGPA." Pet. App. 51a. Second, in denying Southern Union's motion for rehearing of the 1986 order, a differently constituted FERC again found that the damages awarded were not part of the price of gas. Pet. App. 57a-58a. Third, in FERC's final order in this case, it reaffirmed its prior decision that "the tort action was not so 'inextricably intertwined' with the pricing provisions of the NGPA that a finding of preemption was required." Pet. App. 67a.[25]

---

[25] The relevant legislative history here argues for the same result. The legislative history of the 1938 Natural Gas Act makes clear that

> sales for resale, or so-called wholesale sales, in interstate commerce ([including] sales by producing companies to distributing companies) . . . have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. ***The basic purpose of the present***

Contrary to petitioner's suggestion, these analyses were not based on unquestioning acceptance of respondent's "artful pleading" of this case as a "tort" action. To the contrary, petitioner presented this specific argument to FERC, Pet. App. 57a, 65a, and the Commission agreed that the preemption analysis must depend, not on the label given to an action, but on "an analysis of the specific facts presented to determine whether the damages are part of the price paid for natural gas." Pet. App. 66a. In so holding, the Commission cited and distinguished some of the same preemption cases cited in the petition.[26] These cases, involving federal regulatory schemes that are far more pervasive than the federal regulation of natural gas prices, hardly suggest that any federal involvement with a particular industry precludes prosecution of state-law tort actions.[27] To the contrary,

---

legislation is to occupy this field in which the Supreme Court has held that the States may not act.

H.R. Rep. No. 709, 75th Cong., 1st Sess. 1-2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess., 2 (1937) (citations omitted) (emphasis added), *quoted in Eagerton, supra*, 462 U.S. at 184-85. Because states could impose tort obligations on producers before the enactment of the NGA, Congress did not with its passage occupy that arena. Nor has the 1978 Natural Gas Policy Act extended federal regulation of gas pricing to the realm of state tort law.

[26] *See* Pet. App. 66a (citing *Kalo Brick, supra*; *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); and *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468 (9th Cir. 1984)). Petitioner also cites *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985), for the proposition that tort claims may be preempted if they are "inextricably intertwined" with federal labor contract issues. Pet. 17. It fails to note that FERC expressly rejected the notion that the instant tort claim is "inextricably intertwined" with federal regulation of gas prices. Pet. App. 67a.

[27] In *Kalo Brick, supra*, the Court dealt with one of "the most pervasive and comprehensive of federal regulatory schemes"—the Interstate Commerce Act. 450 U.S. at 318. It simply held that since the ICC is specifically authorized to regulate a railroad's

they emphasize the need for careful examination of the particular federal and state laws at issue.[28] Such an examination occurred here, and the ruling below of nonpreemption is unassailable in view of the fact that this tort action in no way bypasses federal limits on payments for purchase of natural gas.

3. *Federal Duties and the State Tort Theory.* Petitioner's final argument is that the findings of negligent misrepresentation and justifiable reliance made by the state court are inconsistent with respondent's duties under federal law—specifically its duty to be aware of all gas sales that are subject to federal regulation. Here again, however, petitioner has not come up with a valid reason to preempt this state tort judgment.

In this context, it is important to recognize the specific findings and conclusions of the state trial court. The court found that (1) Southern Union had the unilateral power to determine whether gas under the disputed contracts would be shipped in interstate commerce

---

abandonment of lines, and approved abandonment in that case, a state court tort action raising the same question was preempted.

The remaining cases cited by petitioner involved labor law, where Congress has passed sweeping regulatory legislation. *See International Longshoreman's Ass'n v. Davis*, 106 S. Ct. 1904, 1911-13 (1986). Even in this field, however, this Court has approved state tort actions in appropriate circumstances. *See, e.g., United Constr. Workers v. Laburnum Constr.*, 347 U.S. 656 (1954). *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

Similarly, pervasive federal regulation of other areas has not preempted all state tort actions. For example, the Court has found that "the Federal Government has occupied the entire field of nuclear safety concerns." *Pacific Gas & Electric, supra*, 461 U.S. at 212. Nonetheless, some state tort actions are not preempted by federal regulation in the field of nuclear energy. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

[28] *See, e.g., Kalo Brick, supra*, 450 U.S. at 317-324; *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 295-301 (1977).

and thus become subject to federal regulation, (2) Southern Union had knowledge about whether interstate shipment has occurred, whereas Consolidated did not, (3) Southern Union falsely represented in the 1976 settlement agreement that all gas under the contracts had been shipped intrastate, and (4) "CONSOLIDATED was justified and entitled to rely on the representation of SOUTHERN UNION and did, in fact, rely upon that representation." Resp. App. 3a, 7a.

In light of these findings, there are at least two problems with petitioner's argument that the state tort theory is inconsistent with relevant federal duties. First, Southern Union has pointed to no provision of federal law requiring respondent to do anything more than it did here—*i.e.*, to make inquiries concerning the resale destination of its gas to the party with the sole knowledge of and control over that issue.[29] It was only when petitioner assured respondent that gas under the contracts had never been shipped interstate that Consolidated justifiably relied on this characterization in accepting an overall package of consideration to settle the earlier lawsuit. It was hardly inconsistent with federal policies for it to do so.

Second, even assuming that petitioner could establish that respondent had a federal legal duty to do the impossible—*i.e.*, to determine that Southern Union was misrepresenting the intrastate nature of the shipment of gas sold under the four contracts—the existence of such a duty still would not require preemption here. The reason is that the state tort claim at issue would complement, rather than interfere with, such a federal duty. Producers will be much less likely to have accurate knowl-

---

[29] As noted above, *see* note 3 *supra*, gas under a given contract does not become subject to federal price ceilings until it actually flows in interstate commerce. The existence of a federal certificate covering a given contract, absent proof of interstate transport, does not bring federal price regulation into play.

edge of the jurisdictional status of their gas if, when they sell to a purchaser like Southern Union that has the unique ability to direct gas into its choice of interstate or intrastate lines, that purchaser can misrepresent the relevant facts with impunity. In sum, petitioner's effort to conjure up a conflict between state and federal interests in this case is simply unconvincing.

II. There is No Reason to Review a Fact-Specific Ruling in an Area Where FERC Itself Is Just Beginning to Elaborate Rules on a Case-by-Case Basis.

Even assuming that this Court were to have doubts about the merits of the decision below, there still would be no reason to grant review here. The facts of this case—involving a negligent misrepresentation inducing detrimental reliance in the settlement of a state-law case—are unlikely to recur. Moreover, both the court below and, even more clearly, FERC decided the preemption issue on the basis of this case's unique facts. Other tort claims, in other factual settings, may be treated differently. The applicable rules will be developed through a process of case-by-case adjudication.

Because the rulings below establish no governing law outside the context of this case's relatively unique facts, it can hardly be said that the case presents a question of exceptional importance warranting the attention of this Court. But the argument against Supreme Court review at this stage is even stronger than that. FERC, while indicating a desire to work out issues of preemption of state torts on a case-by-case basis, has had only this case and one other,[30] since *Arkla* in 1981, in which to address these issues. If the Court were to enter this field now, its holding might well interfere with the orderly development of the applicable principles at FERC and in the courts. There is no reason to run this risk

---

[30] *Gulftide, supra.*

in a case that otherwise bears so few of the hallmarks of a case justifying Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL M. SMITH *
DAVID A. BONO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 755-0184

MICHAEL B. CAMPBELL
BRADFORD C. BERGE
CAMPBELL & BLACK, P.A.
P.O. Box 2208
Santa Fe, NM 87504
(505) 988-4421
Counsel for Respondent

* Counsel of Record

APPENDICES

APPENDIX A

FIRST JUDICIAL DISTRICT COUNTY
OF SANTA FE
STATE OF NEW MEXICO

No. SF 79-2161 (C)

CONSOLIDATED OIL & GAS, INC.,
Plaintiff,

vs.

SOUTHERN UNION COMPANY,
GAS COMPANY OF NEW MEXICO,
AND SOUTHERN UNION
GATHERING COMPANY,
Defendants.

[Filed July 12, 1985]

DECISION OF THE COURT

THIS MATTER came before the court for trial to the bench on the merits on April 1, 1985. Plaintiff appeared by counsel, Michael Campbell and Bradford Berge; Defendants appeared by Victor Ortega, Leo J. Hoffman and Bruce E. Henderson. At that time, evidence was taken and arguments heard by the court after which the court determined the matter in favor of the Plaintiffs and awarded appropriate damages. The court's Decision is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Consolidated Oil & Gas, Inc. (CONSOLIDATED) is a Colorado corporation authorized to do business in New Mexico.

2. Southern Union Company is a Delaware corporation authorized to do business in New Mexico; Gas Com-

pany of New Mexico was, at all material times, a division of the Southern Union Company; Southern Union Gathering Company was, at all material times, a Delaware corporation, a wholly-owned subsidiary of the Southern Union Company, and authorized to do business in New Mexico. (SOUTHERN UNION)

3. At all material times, the defendants acted jointly for and on behalf of one another.

4. SOUTHERN UNION buys gas at the wellhead from suppliers in the San Juan Basin, including CONSOLIDATED; SOUTHERN UNION resells the gas both solely within New Mexico and outside the state in interstate commerce.

5. Before 1974, CONSOLIDATED and SOUTHERN UNION had entered into various contracts for the sale and purchase of gas at a time when federal regulation of the oil and gas industry was minimal.

6. These contracts included the August 24, 1956 Contract, the January 1, 1958 Contract, the September 26, 1960 Contract and the November 26, 1960 Contract, collectively called the Disputed Contracts.

7. In the mid-60's, federal regulation created a market environment which made it beneficial for gas suppliers, like CONSOLIDATED, to allow SOUTHERN UNION to determine whether gas would be sold within the state and outside the state in order that all suppliers could guarantee a fair share of the market.

8. In order to participate, CONSOLIDATED was obliged to apply to the federal regulatory agency, then the Federal Power Commission, to authorize the sale of gas to SOUTHERN UNION in interstate commerce for resale.

9. The application was granted by the FPC and CONSOLIDATED was issued a Certificate of Public Convenience and Necessity, relating to the four Disputed Contracts.

10. At the time, CONSOLIDATED had no legal staff and was assisted in the drafting of the application, its filing and in the pursuit before the Commission of the Certificate of Public Convenience and Necessity by attorneys employed by SOUTHERN UNION.

11. SOUTHERN UNION was, in comparison to CONSOLIDATED, a very large company, sophisticated in the field and possessed of a sizeable and experienced legal staff.

12. SOUTHERN UNION ran two parallel underground pipelines in the San Juan Basin, one of which transported gas for resale solely within the State of New Mexico, the second of which transported gas for resale partly within the State of New Mexico in intrastate commerce and partly outside the State of New Mexico in interstate commerce.

13. SOUTHERN UNION possessed the sole ability to determine the pipeline through which gas produced from any particular well subject to the Disputed Contracts would be transported and, by that determination, whether gas from that well would flow in interstate or intrastate commerce.

14. SOUTHERN UNION possessed the ability to easily and unilaterally switch a producer's well from one pipeline to the other.

15. Only SOUTHERN UNION possessed the knowledge of the resale destination of the gas covered by the Disputed Contracts and flowing in its pipelines.

16. CONSOLIDATED had no independent knowledge of the resale destination of the gas it sold to SOUTHERN UNION and could only know by asking SOUTHERN UNION for those facts.

17. In the late 60's and early 70's, the market began to favor intrastate sales because interstate sales were so heavily regulated by the federal government; prices for

intrastate gas began to rise substantially beyond those offered for interstate gas.

18. The Disputed Contracts each contained a "favored nations" or price escalation clauses which generally required that SOUTHERN UNION buy gas from CONSOLIDATED at the highest prices paid to any producer in the Basin.

19. In light of increasing federal regulation of natural gas prices, it became increasingly important to determine the resale destination of the gas so as to secure the best possible price.

20. In September 1974, CONSOLIDATED and a number of other producers sued SOUTHERN UNION alleging a breach of the "favored nations" clauses in those contracts for gas sold in intrastate commerce but did not include the Disputed Contracts as they were controlled by the FPC.

21. SOUTHERN UNION prevailed in the District Court and the suit moved into the appellate forum where it was the best judgment of the lawyers involved that the District Court's decision would likely be reversed.

22. SOUTHERN UNION began negotiating settlement agreements with the producers, including CONSOLIDATED.

23. SOUTHERN UNION's goal was to settle all claims and by a date certain in order to gain certain economic or tax advantages.

24. In the course of negotiations, CONSOLIDATED began to focus on the resale destination of its gas, the means by which SOUTHERN UNION could affect sales in interstate or intrastate and ways to avoid federal regulation of its sales.

24. To that end, CONSOLIDATED specifically questioned SOUTHERN UNION on where its gas was being

sold pursuant to its various contracts; SOUTHERN UNION was unwilling or unable to say.

25. In the proposed settlement agreement between CONSOLIDATED and SOUTHERN UNION, 10 contracts were included; some of the Disputed Contracts were among those included in the agreement.

26. The proposed agreement was prepared in draft by lawyers employed by SOUTHERN UNION.

27. The settlement agreement contained a recital which stated that it was recognized by the parties that all of the gas being sold by CONSOLIDATED under the contracts in the settlement agreement, including one of the Disputed Contracts, was resold and consumed solely within the state of New Mexico and therefore such sales were not subject to FPC regulation.

28. The agreement was not satisfactory to CONSOLIDATED because it did not include all of the Disputed Contracts and the agreement was returned to SOUTHERN UNION with a request to include them; no other significant changes were sought.

29. SOUTHERN UNION lawyers prepared a second settlement agreement which now included all of the Disputed Contracts and which included the recital referred to in Finding No. 27.

30. CONSOLIDATED signed the agreement and, relying upon it, abandoned its appeal, dismissed its case and released its claims against SOUTHERN UNION.

31. SOUTHERN UNION's representation in the settlement agreement that the gas covered by the Disputed Contracts was resold and consumed solely within the State of New Mexico and, therefore, not subject to FPC regulation was not true.

32. SOUTHERN UNION knew or should have known it was not true and its principal lawyer conceded that it

was careless on the part of SOUTHERN UNION to include the Disputed Contracts in the agreement.

33. SOUTHERN UNION never intended to treat the gas purchased from CONSOLIDATED as "intrastate" gas and always intended to treat it as "interstate" gas.

34. Sometime after the signing of the agreement, SOUTHERN UNION informed CONSOLIDATED that it had mistakenly included the Disputed Contracts in the agreement and that it intended to tender "interstate" prices for the gas it was to purchase under those Disputed Contracts, notwithstanding the settlement agreement.

35. Based upon the claim of "mistaken inclusion," SOUTHERN UNION tendered to CONSOLIDATED purchase prices based upon "interstate" gas; CONSOLIDATED accepted the tender but specifically did not waive its right to claim "intrastate" prices in accordance with the settlement agreement.

36. In addition to the other agreements, SOUTHERN UNION had agreed to pay a lump sum settlement to CONSOLIDATED which was, in part, predicated on the "intrastate" nature of the gas in the Disputed Contracts; at, or shortly after the signing of the agreement, SOUTHERN UNION paid the sum to CONSOLIDATED.

37. By reason of the misrepresentation and CONSOLIDATED's reasonable reliance thereon, CONSOLIDATED suffered monetary damages which are ascertainable with certainty, are specific and are not speculative in nature.

38. CONSOLIDATED has suffered the loss of $8,427,978, which is the amount equal to the difference between what it was paid by SOUTHERN UNION under the settlement agreement and the amount it would have been paid had the representations of SOUTHERN UNION been true.

39. The delay in prosecution of this litigation is largely due to the efforts of SOUTHERN UNION to assert or secure federal jurisdiction over the subject matter so as to remove it from the jurisdiction of this court.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this litigation, with respect to the construction of the settlement agreement and the common law tort claims.

2. Under the facts of this case, SOUTHERN UNION owed a duty to CONSOLIDATED to truthful and accurate information concerning the resale destination of gas covered by the Disputed Contracts.

3. SOUTHERN UNION, by their words and conduct, represented to CONSOLIDATED that "all of the gas" under the Disputed Contracts "was resold and consumed solely within New Mexico."

4. That representation was not true.

5. CONSOLIDATED was justified and entitled to rely on the representation of SOUTHERN UNION and did, in fact, rely upon that representation.

6. By signing the settlement agreement, dismissing its lawsuit against SOUTHERN UNION and releasing its claims against SOUTHERN UNION, CONSOLIDATED relied to its detriment on the untrue representation of SOUTHERN UNION.

7. In making the untrue representation, SOUTHERN UNION failed to exercise reasonable care and competence in obtaining and communicating accurate information well within their knowledge and were negligent in making the untrue representation.

8. As a direct and proximate cause of the conduct of SOUTHERN UNION, CONSOLIDATED has been damaged in the amount of $8,427,978.

9. In the court's discretion, CONSOLIDATED is entitled to pre-judgment interest on such sum in the amount of $2,595,989, which is calculated at 6% simple interest, the rate prevailing at the time the lawsuit was brought.

10. SOUTHERN UNION did not prove their affirmative defenses or their counterclaim and, on the same grounds as it has found in favor of CONSOLIDATED, it finds against SOUTHERN UNION on the counterclaim.

11. Any proposed Findings and Conclusions which are inconsistent with the foregoing are herewith specifically rejected.

/s/ Art Encinias
ART ENCINIAS
District Judge

APPENDIX B

BEFORE THE NEW MEXICO PUBLIC SERVICE COMMISSION

Case No. 1179

IN THE MATTER OF SOUTHERN UNION GAS COMPANY'S APPLICATION SEEKING INCREASES IN ITS COST OF GAS CHARGED TO THE ADJUSTMENT ACCOUNT; AND FURTHER REQUESTING AUTHORIZATION WITHIN A SIX MONTH AMORTIZATION PERIOD OF AN AMOUNT EQUAL TO THE DIFFERENCE BETWEEN THE ADJUSTMENT ACCOUNT UNDER ORDER 375 AND THE ADJUSTED 43¢/MCF YEAR ENDED PROPOSED TO BE CHARGED TO THE ADJUSTED ACCOUNT

FINAL ORDER

STATEMENT OF THE CASE:

On October 30, 1974, Gas Company of New Mexico (a division of Southern Union Company, formerly called Southern Union Gas Company, and referred to herein as "Gas Company") filed its application with the New Mexico Public Service Commission (herein named Commission) initiating this proceeding. Hearings were held, and on December 31, 1974, the Commission issued its Findings of Fact and Order herein authorizing Gas Company to make certain collections from its customers, directing that the amounts so collected be held in a separate account, and terminating the proceeding pending the outcome of certain litigation described therein, all as is more fully set forth in the Findings of Fact below. The Order of December 31, 1974, was appealed to the District Court of Santa Fe, New Mexico, in Cause No. 49244 and was affirmed by the Court.

On November 7, 1975, Intervenor Southwest Valley Area Council, filed herein its motion for an order grant-

ing a refund to the customers of Gas Company. A hearing was held upon said motion, and the motion was denied by an order entered on January 13, 1976.

On May 21, 1976, Gas Company filed herein its Motion for Approval of Proposed Settlement Agreements and Authorization of Distribution of Funds. The Commission, by Order of Hearing and of Notice entered May 26, 1976, found that it was in the public interest to hold a formal hearing on the questions raised by the said Motion and ordered a hearing to be held on June 14, 1976.

Proof of publication of a copy of the said Order of Hearing and of Notice once in a newspaper of general circulation in each county wherein Gas Company does business at least ten days prior to the date set for hearing has been furnished to the Commission.

In addition to the interventions previously allowed by the Commission in this proceeding, namely, interventions by Public Service Company of New Mexico, Southwest Valley Area Council, Town of Clayton, Union County, and the Attorney General of New Mexico, a Petition for Leave to Intervene was filed by J. Walter Kellman, and such Petition was granted at the hearing on June 14, 1976.

At the appointed time and place the hearing was duly held and was completed on June 15, 1976. Chairman Richard P. Montoya and Commissioner Gary Blakeley were present throughout the hearing.

APPEARANCES:

For Gas Company of New Mexico:

Seth D. Montgomery, Esq.
Santa Fe, New Mexico
Jack Hertz, Esq.
Albuquerque, New Mexico

For the Attorney General of New Mexico:

Paul L. Biderman, Esq.
Santa Fe, New Mexico

For Southwest Valley Area Council:

Charles D. DuMars, Esq.
Albuquerque, New Mexico
Tony Marquez, Esq.
Albuquerque, New Mexico

For the Town of Clayton, New Mexico:

Alvin Jones, Esq.
Clayton, New Mexico

For Public Service Company of New Mexico:

Richard B. Cole, Esq.
Albuquerque, New Mexico

For J. Walter Kellman:

J. Walter Kellman, pro se
Albuquerque, New Mexico

For the Commission:

Leonard A. Helman, Esq.
Santa Fe, New Mexico

Having heard the testimony, considered the evidence and being otherwise fully informed in the premises.

The Commission F I N D S :

1. The Statement of the Case, above, is adopted by these Findings and is incorporated by reference herein.

2. Gas Company of New Mexico is a division of Southern Union Company (formerly Southern Union Gas Company), a Delaware corporation duly authorized to transact business in the State of New Mexico as a public utility under the New Mexico Public Utility Act.

3. This Commission has jurisdiction over the parties to this proceeding and over the subject matter of this proceeding.

4. On December 31, 1974, this Commission issued its Findings of Fact and Order (hereinafter called "Order 1179") in this proceeding, authorizing and directing Gas Company to make certain charges to the Adjustment Account (as defined in Section 20 of Gas Company's Rules and Regulations of Service on file with this Commission, hereinafter called "Rule 20"), and to certain of its Unaffected Rate Schedule customers, all as more fully set forth in its Order. Order 1179 further directed that the amounts collected by Gas Company pursuant thereto in excess of current wellhead gas costs actually paid were to be invested by Gas Company in certain securities. The funds so invested, together with the interest earned thereon, were to be used by Gas Company for the discharge of any liabilities, including interest, that might be finally determined to be payable by Gas Company for increased wellhead gas costs from and after January 1, 1975. The Commission made no decision on collecting for the period from June 21, 1974 to December 31, 1974. The amounts of such funds, including interest earned thereon, not finally determined to be required for the discharge of such liabilities, were to be refunded to Gas Company's customers as the Commission might then direct.

5. On December 14, 1974, the Commission issued its Order No. 375 (hereinafter called "Order 375"), referred to in Finding No. 7, of Order 1179 and a copy of which was admitted into evidence during the December 1974 hearing in this proceeding as Petitioner's Exhibit 1. In Order 375, the Commission authorized and directed Gas Company to make certain charges to its Affected Rate Schedule customers and directed that if a lesser price for gas could be sustained by Gas Company, the difference between the price authorized in Order 375

and the actual cost of such San Juan Basin gas to Gas Company, with interest, would be refunded by appropriate credits to the Adjustment Account. As Stated in Finding No. 7 of Order 1179, the authorization granted to Gas Company in Order 375 resulted from Gas Company's exposure to unrecoverable increased gas costs entailed by the contention that Gas Company was entitled to pay the San Juan Basin producers under certain concepts of vintaging then in effect.

6. Claims for increased wellhead gas costs, irrespective of the "vintage" of the gas sold, were asserted against Gas Company in two actions filed in the District Court of Santa Fe County, New Mexico, Cause Nos. 48483 and 48543, as described in Finding No. 10 in Order 1179, as well as an action instituted on February 5, 1975, in Dallas County, Texas, Cause No. 75-1218-A, styled *Aztec Oil and Gas Company v. Southern Union Gas Company and Southern Union Gathering Company.* These actions are hereinafter referred to collectively as "the Producer Litigation". As set forth in Finding No. 11 and 12 in Order 1179, Gas Company's liability, if any, to each of its other San Juan producers is similar to that asserted against it in the Producer Litigation.

7. The aggregate liability to which Gas Company is subjected (either directly or on account of its wellhead purchases of gas through Southern Union Company's wholly-owned subsidiary, Southern Union Gathering Company) as a result of the claims asserted in the Producer Litigation and similar claims by Gas Company's other San Juan Basin producers amounted, as of the end of May, 1976, to $36,606,634.60 (which amount includes estimates for April and May, 1976), inclusive of interest, or some greater amount which could result from an adverse decision on the "fair market value" issue referred to in Finding 10, below.

8. The amounts billed by Gas Company to its customers (including Southern Union Gathering Company's

customer, El Paso Natural Gas Company) under the provisions of Order 375 and Order 1179, with interest thereon as provided in said Orders, is hereinafter called the "Contingency Fund". As of the end of May, 1976, the Contingency Fund aggregated $23,146,503.35 (which amount includes estimates for May, 1976).

9. The difference between the liability to which Gas Company is exposed and for which it has billed its customers under the provisions of the two Orders constitutes a serious and imminent threat to the financial integrity of Gas Company as a public utility within the State of New Mexico. Further, in the event such liability is ultimately established and required to be discharged by Gas Company, its only recourse will be to amortize the additional gas costs so determined through charges to its customers.

10. The potential liability referred to in Findings 7 and 9 above, arises out of the claims in the Producer Litigation for payment to the producers under the "price equalization" clauses in the respective gas purchase contracts between the producers and Gas Company and Southern Union Gathering Company. In addition to such claims, several of the plaintiffs in the Producer Litigation have also asserted claims, pursuant to applicable provisions in their respective gas purchase contracts, for payment at the "fair market value" or "fair field price" of the gas sold under such contracts beginning January 1, 1974. Such claims, if ultimately successful, would result in all other San Juan producers being entitled to payment at the price levels so determined by virtue of their price equalization clauses. If such price levels were determined to be higher than those otherwise asserted in the Producer Litigation, there would be an additional aggregate liability upon Gas Company, not covered by advance collections under Orders 375 and 1179. Such a liability would constitute an additional threat to the financial integrity of Gas Company and would require additional amortization charges in order to be discharged.

11. The New Mexico portion of the Producer Litigation is presently pending before the New Mexico Supreme Court on appeal from the District Court of Santa Fe County. The District Court ruled in favor of Gas Company on its defenses to the Claims asserted by the producers under the price equalization provisions of their respective gas purchase contracts. The District Court has not ruled on the fair market value claims. The questions involved on the appeal to the Supreme Court are questions of first impression as to which there is a reasonable basis for difference of opinion. A strong possibility exists that the Supreme Court will reverse the District Court, thereby exposing Gas Company to liability for the full $36 million of additional gas costs. The Texas portion of the Producer Litigation is presently awaiting trial.

12. In order to avoid the hazards and uncertainties of litigation, and in order to secure for itself and its customers the benefits of a compromise and settlement of the Producer Litigation, Gas Company has engaged in negotiations with the various producers involved in such litigation in an effort to bring about resolution of the controversies involved. These negotiations have recently been concluded and have culminated in tentative agreements, subject to certain contingencies, with the producers who are plaintiffs in the Producer Litigation. All of the claims against Gas Company would be dismissed with prejudice and Gas Company would enter into new or supplemental gas purchase contracts with such plaintiffs. Copies of the proposed settlement agreements, including the provisions of such new or supplemental gas purchase contracts, and of the proposed Stipulation of Dismissal to be filed with the District Court of Santa Fe County, were admitted into evidence in this proceeding.

13. Under the terms of the proposed settlements, Gas Company would distribute from the Contingency Fund $16,093,452.59 (subject to adjustment as provided in

Finding 15 below) to its San Juan Basin producers, including the plaintiffs in the Producer Litigation, in proportion (with one minor exception) to the amounts of their respective claims against Gas Company. The balance of the Contingency Fund, $7,053,050.76, would be available for refund or other credit to Gas Company's customers (including Southern Union Gathering Company's customer, El Paso Natural Gas Company in the manner hereinafter directed.

14. The proposed settlement of the Producer Litigation is fair and reasonable and in the public interest.

15. That portion of the Contingency Fund to be distributed to Gas Company San Juan producers should be distributed as follows: Gas Company should calculate the actual amount to which each producer is entitled under the terms of the settlement as described herein for its sales of gas to Gas Company and Southern Union Gathering Company through the end of May, 1976 and should pay such amount to or for the account of such producer from the Contingency Fund. The aggregate payments from the Contingency Fund should not exceed $16,093,452.59. If the total of such payments (hereinafter called "Increased Gas Costs") exceeds $16,093,452.59, the difference should be paid from Gas Company's general corporate funds and should be charged to the Adjustment Account under Rule 20. If such total is less than $16,093,452.59, the difference should be credited to the said Adjustment Account.

16. The amount to be refunded to Gas Company's Affected Rate Schedule customers under the settlement as approved herein should be refunded by check to each of such customers, unless the amount of the refund due is less than one dollar, in which case the refund may be credited to the customer's next bill. Each Unaffected Rate Schedule customer may elect to receive its refund by check or through a credit to a future bill.

17. The portion of the Contingency Fund remaining after distribution of the amount due to the producers pursuant to Finding 15 above should be distributed as follows: Gas Company should determine the portions of Increased Gas Costs attributable to its Affected Rate Schedule customers and Unaffected Rate Schedule customers, respectively, for each month during the period from January, 1974-May, 1976. The dollar amount attributable to all Affected Rate Schedule customers should then be divided by the total volume of gas consumed during the period from January, 1975 to May 1976 by all Affected Rate Schedule Customers and the resulting refund quotient (expressed in cents to the nearest tenth, per Mcf) should be multiplied times the actual volume of gas consumed by each Affected Rate Schedule customer during the same period. The product will constitute the amount to be refunded to each Affected Rate Schedule customer, and shall include an amount attributable to gross receipts taxes, both state and local. The portion attributable to Unaffected Rate Schedule customers shall be determined by subtracting from the amount collected from such customer pursuant to Order 375 and Order 1179 during the period January, 1974-May, 1976 an amount equal to each such customer's proportionate share of the increased gas cost determined in accordance with the terms of each such customer's contract. Within ten business days after the date of this Order, Gas Company should file with the Commission for its review and approval a report showing the amounts attributable to the Affected Rate Schedule customers, and the Unaffected Rate Schedule customers, the derivation of the proposed refund quotient for Affected Rate Schedule customers, an approximate amount of gross receipts taxes to be refunded, and the amount proposed to be refunded to each Unaffected Rate Schedule customer together with all supporting calculations.

18. All expenses derived from calculation, issuance or distribution of any refund checks should be absorbed by Gas Company and not by the customers.

19. The Affected Rate Schedule customers are herein defined as any person, persons, or business entity which has purchased gas from Gas Company during the period from January 1, 1974 to May 31, 1976, as defined in Case No. 1179. Gas Company shall include in the refund plan not only customers who are presently being served but all customers who received service within the period stated above. Gas Company shall use every effort in contacting all Affected Rate Schedule customers who have paid a gas bill during the period of collection. The Commission believes it is appropriate for Gas Company to mail checks to all Affected Rate Schedule customers and to make public announcement that persons at new addresses in this State or elsewhere may claim their refunds.

The Commission O R D E R S:

A. The Proposed Settlement of the Producer Litigation is approved by this Commission, and Gas Company is authorized to enter into settlement agreements with the plaintiffs in the Producer Litigation and into a Stipulation of Dismissal in the New Mexico portion of the Producer Litigation, all such documents to be in substantially the form of the documents admitted into evidence in this proceeding. Within ten business days after execution of such documents, Gas Company shall file with the Commission true copies of all such agreements and the Stipulation of Dismissal as executed.

B. Gas Company is authorized to distribute the portion of the Contingency Fund to be distributed to its San Juan producers in effectuating the settlement, up to a maximum distribution of $16,093,452.59, in the manner set forth in Finding 15 above. Any excess or deficiency between the total of such payments (Increased Gas Costs) and $16,093,452.59 shall be charged or credited to the Adjustment Account under Rule 20 as set forth in Finding 15.

C. If the settlement is consummated as contemplated by this Order and if payments to the producers are made as authorized in the preceding paragraph, then Gas Company is directed to make distribution of the balance of the Contingency Fund in the manner described in Finding 17, above. Prior to making such distribution, Gas Company shall file the report and supporting calculations referred to in Finding 17. The Commission shall approve, disapprove, or modify Gas Company's proposed distributions to its respective customers prior to the making thereof.

D. Copies of this Final Order shall be mailed to Gas Company of New Mexico, Intervenors and their attorneys.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 22nd day of June, 1976.

[SEAL]

NEW MEXICO PUBLIC SERVICE COMMISSION

/s/ Richard P. Montoya
RICHARD P. MONTOYA
Chairman

/s/ Gary Blakeley
GARY BLAKELEY
Commissioner